

American Civil Liberties Union of Montana

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EXHIBIT.	4	
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HB 32		

TESTIMONY OF DEBORAH SMITH ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION OF MONTANA

HB 321 HEARING, HOUSE JUDICIARY COMMITTEE JANUARY 23, 2007

As it has done in every legislative session when prior versions of this bill have been introduced, the American Civil Liberties Union of Montana opposes HB 321. HB 321 would revise the judicial bypass provisions under Montana's Parental Notice of Abortion Act. ACLU's opposition is anchored in the rights to privacy and equal protection set forth in the Montana and United States Constitutions.

It is worth noting at the outset that Montana's entire Parental Notification Act,§§ 50-20-201 through 215, MCA, not just the judicial bypass section that this bill addresses, was declared unconstitutional in Wicklund v. State, by the Lewis and Clark County District Court in February 1999. That same court permanently enjoined the entire Act's enforcement, meaning that none of the Parental Notification Act remains in effect. An appeal by the State of Montana of the Wicklund decision to the Montana Supreme Court was voluntarily dismissed by the State in November 1999, following the Supreme Court's decision the prior month in Armstrong v. State, which ruled that the Montana Constitution's express and fundamental right to privacy encompasses a woman's decision whether to have an abortion; indeed, it is one of the most private decisions that a woman could ever make. The Court declared that the State might abridge a woman's right to choose an abortion in "narrowly defined instances", using "clear and convincing evidence", to demonstrate a "compelling interest" to preserve the safety, health and welfare of a class of patients or the general public from a "medically acknowledged, bona fide health risk". By moving to dismiss Wicklund in light of the sweeping language and broad analysis of Armstrong, the State appears wisely to have acknowledged that it could not succeed in having Wicklund reversed.

HB 321 does nothing to address the constitutional problems contained in the Parental Notification of Abortion Act, and fails completely to meet the exceedingly narrow category of cases in which the State might appropriately act to restrict access to abortion services. To begin, HB 321 would amend only one of fifteen sections of law declared unconstitutional. But even assuming for the sake of argument that the other 14 sections might be constitutionally permissible (an assumption that ACLU contends would be false), the amendments proposed to § 50-20-212 do not rectify constitutional infirmities found by the district court in *Wicklund*, *Armstrong*, and related cases.

HB 321 also requires an incompetent woman either to obtain a parent's or legal guardian's permission before having an abortion, or to go through a judicial bypass procedure.

These provisions also would be an unconstitutional violation of fundamental constitutional rights.

With regard to minors

- Changing the finding that a minor be "competent" instead of "sufficiently mature" to make the decision to have an abortion runs directly afoul of the district court's decision in *Wicklund*, because the court's analysis in that case explicitly relies on unrefuted evidence concerning a minor's competence to make that decision. The entire *Wicklund* decision is grounded in the concept that minors, like adults, are legally competent to choose an abortion.
- Lengthening the time for a district court judge to make a decision to waive parental notification from 48 hours to 5 days would exacerbate, not remedy, the constitutional defects of the existing Act. In a comparable case challenging Montana's Women's Right to Know Act, the district court struck down as a violation of the rights to privacy and due process a 24-hour waiting period between the time a woman received certain information about abortion and pregnancy from a physician and receiving an abortion. Likewise, lengthening an already problematic period of time (48 hours) in an unconstitutional Act is folly at best. At worst, it is an unlawful attempt to override a judicial interpretation of Montana's constitution and statutes. This the Legislature has no constitutional authority to do.
- The bill shifts from one subsection to another the evidentiary finding "in the best interests of the petitioner" that a judge must make before allowing a waiver of parental notification. Yet moving around a provision within an unconstitutional statute does not rectify the constitutional problem with imposing a judicial bypass process in the first place. Similarly, sealing the record or providing for *in camera* proceedings do not fix the constitutional problem presented by a minor being required to go into court before having an abortion. Nor, finally, would an untethered legislative assertion that such proceedings are "for the protection of minors and incompetent persons" survive strict constitutional scrutiny. In short, this bill if enacted into to law is certain to be declared unconstitutional again.

With regard to incompetent persons

- The term "incompetent persons" is unconstitutionally vague. No legislative definition of the term is provided, and no guidelines are given to a court to help determine who is "competent".
- A state cannot, and should not, impose reproductive choices on any individual, regardless of mental or physical capacity. To attempt to do so would take us back to the days of the early 20th century when followers of eugenics forcibly sterilized disabled people or people convicted of certain crimes.
- The medical profession already has in place procedures for giving medical care to people that may not be able to make their own knowing and voluntary decisions. Involvement of the state in such decisions is not only unconstitutional, it is unnecessary.